United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1292

United States Court of Appeals For the Second Circuit

B
P/S

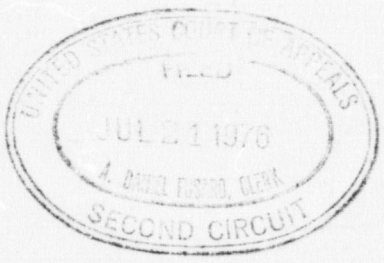
UNITED STATES OF AMERICA,
Appellee,

v.

JOHN GIANGRANDE,
Defendant-Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN GIANGRANDE,

Defendant-Appellant.

Docket No.76-1292

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STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from an Order made by United States District Judge Henry Bramwell in the United States District Court for the Eastern District of New York on June 23rd, 1976, denying appellant Giangrande's motion to dismiss the Indictment prior to a re-trial.

Appellant Giangrande's motion to dismiss the Indictment was made in open court after the trial Court's sua sponte declaration of a mistrial, and was based on the Double Jeopardy Clause of the Fifth Amendment.

STATEMENT OF FACTS

I. THE INDICTMENT

On December 1, 1975, the Government filed Indictment No. 75 CR 907 charging the appellant John Giangrande with wilful and knowing distribution and possession, and conspiring to wilfully and knowingly distribute and possess, a Schedule I Narcotic Drug, to wit, heroin - [Title 21 U. S. Code Sections 812, 841(a)(1) and 841 (b)(1) and (a)].

Also indicted together with the appellant were the defendants Louis James De Salvatore, Anthony Fago, and George Adamo.

The indictment indicates that the defendant Louis James De Salvatore was the principal target of the Government's investigation and deeply involved in the illegal activities complained of. Louis James De Salvatore is named in Count One as unlawfully dealing in cocaine on December 12, 1974; he is named in Count Two as dealing in heroin on January 8, 1975; he is named in Count Three as dealing in heroin on February 19, 1975; he is named in Count Four as dealing in heroin on March 18, 1975; he is named in Count Five as dealing in heroin on March 20, 1975; and he is named in Count Six as dealing in heroin on March 24, 1975 (A-3 - A-6).

Count Seven is the catch-all, usual conspiracy count charging all of the defendants, including appellant, with conspiring to distribute and possess narcotic drugs between December 1, 1974 and the date of indictment, December 1, 1975 (A-5).

The appellant Giangrande is named only in Count Three of the indictment in a specific situation allegedly occurring on February 19, 1975, and he is again named in the conspiracy Count Seven.

De Salvatore, thus, is named in each and every count of the indictment both before and after the alleged isolated involvement of appellant on February 19, 1975.

II. DEFENDANT DE SALVATORE'S PLEA OF GUILTY

A jury was selected and declared by the defendants De Salvatore, Fago and Giangrande to be satisfactory and acceptable to them. The defendant Adamo, named in the indictment, was deceased and therefore not part of the proceedings at any time.

On the morning of June 22, 1976, the defendant De Salvatore pleaded guilty, prior to opening statements. The District Court (Bramwell, J.) accepted defendant De Salvatore's plea of guilty to Count Seven of the indictment in satisfaction of the indictment (A-9).

Following the Court's acceptance of defendant De Salvatore's plea of guilty, the jury was instructed by the Court that the case of Louis James De Salvatore had been severed, and that he was no longer on trial in this case (A-10).

Thereafter, the Court delivered preliminary instructions to the jury (A-11 - A-14) and advised the Government (Assistant U. S. Attorney Greenidge) to make an opening statement (A-15).

III. GOVERNMENT'S OPENING STATEMENT

The Government's opening statement (A-15 - A-55) dwelt at great length on the prior similar acts of the defendant De Salvatore who had pleaded guilty, was severed, and was no longer on trial.

The prior similar acts outlined by the Government went back to 1971 and 1972, long before the dates alleged in the indictment.

The opening statement further illustrates that Louis James De Salvatore was the major drug dealer involved in this indictment and that the references to him were needed by the Government to influence and prejudice the jury with the weak and fragmented case it had left against Fago and Giangrande.

The opening statement, notwithstanding De Salvatore's guilty plea and severance, was aimed primarily at his prior similar acts, obviously and intentionally to prejudice the jury against the remaining defendants.

IV. GOVERNMENT'S BILL OF PARTICULARS

Pursuant to Order requiring the Government to furnish more particularity as to the conspiracy count of the Indictment, the Government furnished on June 1, 1976, to appellant Giangrande a Bill of Particulars (A-8). The Bill of Particulars alleged:

> "1. John Giangrande joined the conspiracy on or about February 18, 1975."

It is therefore apparent that continued references to De Salvatore's prior similar acts in 1971 and 1972 were calculated by the Government's opening statement to prejudice and influence the jury against Giangrande and Fago. The opening statement was tailored and designed to persuade the jury against Giangrande and Fago through innuendo and guilt by association in being joined as co-defendants in this case with De Salvatore. It made no difference to the Government that De Salvatore had been severed and was no longer on trial.

V. COURT'S REACTION TO GOVERNMENT'S OPENING STATEMENT

Upon completion of the Government's opening, and in the absence of the jury, the Court expressed concern with the Government's reference to prior similar acts of De Salvatore back in 1971 or 1972. The Court stated (A-56) as follows:

"THE COURT: In connection with the opening statement of Mr. Greenidge and at the point where he was discussing prior similar acts of Mr. De Salvatore and other people, I believe this was in 1972, Mr. Greenidge?

MR. GREENIDGE: The prior similar acts?

THE COURT: Yes.

MR. GREENIDGE: Yes. 1971.

THE COURT: Well, unfortunately the individual about whom he was talking is not on trial.

MR. GREENIDGE: He was a co-conspirator, your Honor.

THE COURT: Prior similar acts should -- it would appear, should be strictly limited to the parties who are before the Court. And this was the way the Government opened up. And this in the Court's view appeared to be highly prejudicial and something which may not be able to be corrected with this jury. But that is the Court's position. And I just wanted to convey it to you, to the defendant's attorneys."

VI. ACTION OF DEFENDANTS' COUNSEL

After the Court had expressed the opinion that the Government's opening statement was prejudicial (A-56) and that the prior similar acts of De Salvatore were not properly part of this case (A-59), the Court then made inquiry to defendants' counsel: "Are you ready to proceed?" (A-59).

The Court further stated (A-59):

"THE COURT: I don't know. You can proceed any way you wish. That's up to you. Don't ask me how you can proceed. I am asking you that. Are you ready to proceed? I am asking you.

MR. ARONE: Can we have a moment to mull over the question?

THE COURT: You can mull all you want. But you see, I knew you were mulling when you went out of here before. You have to tell me what you want to do.

(Recess taken.) "

After the recess, the defendant Fago moved for a mistrial in

which the defendant Giangrande joined. (A-59; A-60).

However, prior to a ruling from theCourt, defendants withdrew their motion for a mistrial with consent and permission of the Court (A-61); and were instructed to return the following morning, June 23, 1976. At the resumption of the trial on June 23, 1976, the Court elicited from both defendants' counsel concessions that the Government's opening statement was prejudicial (A-68; A-69); and that the jury was tainted by acts of the Prosecution (A-68).

Notwithstanding extended colloquy between the Court and counsel (A-65 - A-73) both defendants' counsel declined to move for a mistrial (A-66, A-67, A-69).

VII. COURT'S SUA SPONTE DECLARATION OF A MISTRIAL

The Court, in declaring a mistrial stated as follows (A-73, A-74):

"THE COURT: The Court feels it is prejudicial because Mr. De Salvatore was not on trial at the time that was made. Of course, it's clear that the statements made by Mr. Greenidge were inadvertant and there was no intent on the part of the Prosecutor to create or to make an error. But the Court has considered this and has also considered a case, Gorey against the United States, which is found in 367 U. S. 371, and at page 1526 of that opinion it says:

'where, for reasons being compelling by the trial judge, who is thus situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.'

And it further says:

'Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial.'

Well, because of manifest necessity and in the interest of justice, a mistrial is declared by

the Court as to this proceeding.

MR. GREENIDGE: Is that with prejudice, your Honor, or without prejudice?

THE COURT: That's without prejudice. That's without prejudice."

VIII. COURT'S DENIAL OF GIANGRANDE'S MOTION TO DISMISS INDICTMENT BASED ON DOUBLE JEOPARDY

Giangrande's counsel after the mistrial was declared made the following motion which was denied by the Court (A-76):

"MR. OLTARSH: Well, notwithstanding that, I nevertheless technically and respectfully move for a dismissal of the indictment against Mr. Giangrande on the grounds that jeopardy has attached, and prior to the selection of any second jury, I move to dismiss the indictment as against him on the grounds that it is double jeopardy under his rights under the Fifth Amendment.

THE COURT: That application is denied."

The retrial was scheduled for July 6, 1976, but was stayed by order of Bramwell, J., on consent of the Government, until September 20, 1976, pending the result of this appeal.

ARGUMENT

POINT I

APPELLANT GIANGRANDE LOST HIS VALUED RIGHT TO GO TO THE FIRST JURY OF HIS CHOICE AS A RESULT OF PROSECUTORIAL OVERREACHING AND MISCONDUCT. THERE WAS NO "MANIFEST NECESSITY" FOR THE COURT'S DECLARATION OF A MISTRIAL.

Over 150 years ago, Mr. Justice Story enunciated the doctrine of "manifest necessity" that controls the validity of a court's declaration of a mistrial without consent of the defendant. When a trial judge declares a mistrial on his own, a retrial is only permissible if a "manifest necessity" existed for declaring a mistrial lest the "end of public justice would otherwise be defeated". U. S. v. Perez, 9 Wheat.(22 U.S.) 579; 6 L. Ed. 165 (1824). In determining whether "manifest necessity" exists for the declaration of a mistrial the courts must consider the "defendant's valued right to have his trial completed by a particular tribunal" against the public's interest in fair trials designed to end in just judgments. Wade v. Hunter, 1949, 336 U. S. 684, 690; 69 S. Ct. 834, 837.

The decision of the court as to whether or not to declare a mistrial must be made "taking all the circumstances into consideration". U. S. v. Perez, 9 Wheat. at page 580.

In declaring a mistrial sua sponte in this case, the Trial Judge relied on and quoted from a United States Supreme Court case decided in 1961 (A-73, A-74), Gori v. United States, 367 U.S. 364; 81 S. Ct. 1523. In Gori, the prosecution during direct examination of a witness attempted to bring to the attention of the jury other crimes committed by the accused. The Trial Court declared a mistrial without either the approval or objection of defendant. This Court of Appeals upheld the action of the Trial Judge and stated that the Judge "was acting according to his convictions in protecting the rights of the accused". 282 F. 2d at p. 46.

The majority opinion in Gori upheld the action of the Trial Judge, and ruled that the double jeopardy provisions of the Fifth Amendment did not bar a retrial. The Court based its decision, in great part, on the fact that the defendant "benefited" from the declaration of the mistrial. The majority opinion stated at page 366:

> "The Court below did not hold the mistrial ruling erroneous or an abuse of discretion. It did find the prosecutor's conduct unexceptionable and the reason for the mistrial, therefore, not entirely clear."

The Court noted that the record was skimpy, and on the state of that record the Court would not pass upon the broad contentions involving the claim of double jeopardy. The majority in Gori further stated at page 369:

> "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment - cases in which the defendant would be harassed by successive, oppressive prosecutions or in which a judge exercises his authority to help the prosecution at a trial in which the case is going badly by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling where it clearly appears that a mistrial has been granted in the sole interest of the defendant to hold that its necessary consequence is to bar all retrial."

In effect, therefore, this 1961 decision, relied upon by Judge Bramwell, hinged, in the majority opinion, on the question of who benefited from the mistrial.

The dissenting opinion of Mr. Justice Douglas, which was joined in by three other Justices, stated at page 372-3:

> "That is my starting point. I read the Double Jeopardy Clause as applying a strict standard. 'The prohibition is not against being twice punished, but against being twice put in jeopardy.' United States v. Ball, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300. It is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society. Once a trial starts jeopardy attaches. The prosecution must stand or fall on its performance at the trial. I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because the

prosecutor abuses his office and is guilty of misconduct. In neither is there a breakdown in judicial machinery such as happens when the judge is stricken, or a juror has been discovered to be disqualified to sit, or when it is impossible or impractical to hold a trial at the time and place set. The question is not, as the Court of Appeals thought, whether a defendant is 'to receive absolution for his crime.' 282 F. 2d 43, 48. The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it - on the Government."

Subsequent to Gori, however, there have been several decisions of the United States Supreme Court modifying, if not overruling, the concepts set forth in Gori.

In Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, the Trial Judge declared a mistrial, on the Government's motion, because of prosecutorial negligence in failing to have a crucial witness present for the trial. The Supreme Court in that case upheld the bar of the double jeopardy provisions of the Fifth Amendment to a re-prosecution. Mr. Justice Douglas wrote the majority opinion and stated at page 736:

"At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest - when there is an imperious necessity to do so. Wade v. Hunter, supra, 336 U.S. 690, 69 S. Ct. 837-838, 93 L. Ed. 974. Differences have arisen as to the application of the principle. See Brock v. North Carolina, 344 U.S. 424, 73 S. Ct. 349, 97 L. Ed. 456; Green v. United States, 355 U.S. 184, 188, 78 S. Ct. 221, 223-224, 2 L. Ed. 2d 199. Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. Gori v. United States, supra, 367 U. S. 369, 81 S. Ct. 1526-1527, 6 L. Ed. 2d 901. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' United States v. Ball, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300."

It is respectfully submitted that Downum, decided subsequent to Gori, modified the narrow concepts of Gori.

United States v. Jorn, 400 U. S. 470, 91 S. Ct. 547, decided in 1971, also sustained a plea of double jeopardy as a bar to a re-prosecution following the declaration of a mistrial sua sponte. Mr. Justice Harlan, writing the majority opinion, referred to the prior cases dealing with double jeopardy and further modified the holding in the Gori case with respect to a trial judge acting "in the sole interest of the defendant". He stated at pages 482-483:

> "In the instant case, the Government, relying principally on Gori, contends that even if we conclude the trial judge here abused his discretion, re-prosecution should be permitted because the judge's ruling 'benefited' the defendant and also clearly was not compelled by bad-faith prosecutorial conduct aimed at triggering a mistrial in order to get another day in court.....
>
> .....That conception of benefit, however, involves nothing more than an exercise in pure speculation. In sum, we are unable to conclude on this record that this is a case of a mistrial made 'in the sole interest of the defendant.' See Gori v. United States, supra.
>
> Further, we think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action."

This majority opinion further stated at pages 484-485:

> "But it is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal'. See Wade v. Hunter, 336 U.S., at 689, 69 S. Ct. at 837.

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial."

In the latest United States Supreme Court case, United States v. Dinitz, - U. S. -, 96 S. Ct. 1075, decided in March 1976, that Court again reviewed, with great particularity, the whole issue of mistrial-double jeopardy under the Fifth Amendment. In Dinitz, the Supreme Court reversed the Court of Appeals for the Fifth Circuit which had held that a retrial violated the defendant's constitutional right not to be twice put in jeopardy, 492 F. 2d 53. The Trial Court had expelled one of the defendant's attorneys from the court room for alleged misconduct and Dinitz had requested a mistrial. The Court of Appeals for the Fifth Circuit took the position that the case should be treated as though the Trial Judge had declared a mistrial over the objection of the defendant. The Supreme Court reversed the Fifth Circuit Court solely on the ground that the motion for a mistrial was made by the defendant, and was not declared by the Court sua sponte. The majority opinion in Dinitz, per Mr. Justice Stewart, stated at 96 S. Ct. 1079, 1080:

> "The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense. See United States v. Wilson, 420 U. S. 332, 343, 95 S. Ct. 1013, 1021, 43 L. Ed. 2d 232, 241; North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664. Underlying this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' Green v. United States, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204. Where, as here, a mistrial has been declared, the defendant's 'valued right to have his trial

compl ed by a particular tribunal' is also implicated. Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978; United States v. Jorn, 400 U. S. 470, 484-485, 91 S. Ct. 547, 556-557, 27 L. Ed. 2d 543, 556 (plurality opinion); Downum v. United States, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100, 102.

Since Justice Story's 1824 opinion for the Court in United States v. Perez, 9 Wheat. 579, 580, 6 L. Ed. 165, this Court has held that the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether 'there is a manifest necessity for the (mistrial), or the ends of public justice would otherwise be defeated.' Illinois v. Somerville, 410 U.S. 458, 461, 93 S. Ct. 1066, 1069, 35 L. Ed. 2d 425, 429; United States v. Jorn, supra, 400 at 481, 91 S. Ct. at 555, 27 L. Ed. 2d at 554; Gori v. United States, 367 U.S. 364, 368-369, 81 S. Ct. 1523, 1526, 6 L. Ed. 2d 901, 904-905; Wade v. Hunter, supra, 336 at 689-690, 69 S. Ct. at 837, 93 L. Ed. at 978; Simmons v. United States, 142 U.S. 148, 153-154, 12 S. Ct. 171, 172, 35 L. Ed. 968, 970, 971. Different considerations obtain, however, when the mistrial has been declared at th defendant's request. The reasons for the distinction were discussed in the plurality opinion in the Jorn case:

'If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, e[illegible]n if the defendant's motion is necessitated by prosecutori[illegible] or judicial error. In the absence of such a motion, the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See United States v. Perez, 9 Wheat., at 580, 6 L. Ed. at 166.' 400 U.S. at 485, 91 S. Ct. at 557, 27 L. Ed. 2d at 556 (footnote omitted).

The distinction between mistrials declared by the court sua sponte and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' United States v. Jorn, supra, at 484, 91 S. Ct. at 557, 27 L. Ed. 2d at 556. Our prior decisions recognize the defendant's

> right to pursue this course in the absence of circumstances of manifest necesity requiring a sua sponte judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury."

The majority opinion further stated at page 1081:

> "In such circumstances the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed in the event of such error."

Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, decided in 1973, held that double jeopardy did not bar a retrial of a defendant in a State Court because of a procedural fatal defect in the indictment. The Court in this case distilled from previous cases a "general approach" to mistrial-double jeopardy cases premised on the "public justice" policy of Perez. See also Smith v. Mississippi, 478 F. 2d 88 (5th Cir. 1973), and McNeal v. Hollowell, 481 F. 2d 1145 (5th Cir. 1973). One line of cases holds that a mistrial is proper "if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." 478 F. 2d 88 (5th Cir. 1973). Another supplementary line of cases forbids the granting of a mistrial on the basis of any ruling or procedure which would lend itself to prosecutorial manipulation. See Downum v. United States, supra; McNeal v. Hollowell, supra; and United States v. Cheung, 485 F. 2d 689 (5th Cir. 1973).

There were four vigorous dissents in Somerville, and particularly noteworthy are the statements of Justice White at page 476:

> "Here, the prosecutorial error, not the independent operation of a state procedural rule, necessitated the mistrial. Judged by the standards of Downum and Jorn I cannot find, in the words of the majority, an 'important countervailing interest of proper judicial administration' in this case; I cannot find 'manifest necessity' for a mistrial to compen-

sate for prosecutorial mistake."

and of Mr. Justice Marshall at page 483:

> "I believe that Downum and Jorn are controlling. So far I have read Jorn and Downum as restrictively as they can be fairly read. But those cases, I believe, should be read more expansively. They show to me that 'manifest necessity' cannot be created by errors on the part of the prosecutor or judge; it must arise from some source outside their control. Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949), was clearly such a case. So were the cases that the majority says involved situations where 'an impartial verdict cannot be reached', ante, at 1070. In those cases, a juror or the jury as a whole, uncontrolled by the judge or prosecutor, prevented the trial from proceeding to a verdict. United States v. Perez, 9 Wheat. 579 (1824); Simmons v. United States, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968 (1891); Thompson v. United States, 155 U.S. 271, 15 S. Ct. 73, 39 L. Ed. 146 (1894)."

In the instant case appellant neither requested nor consented to the mistrial declared by the Court. Though both defendants, when prodded by the Trial Judge, moved for a mistrial on June 22, 1976, there was nevertheless an effective and complete withdrawal of the motion prior to a ruling thereon with the consent and approval of the Court. Thus, in effect, the Court declared the mistrial on its own, based on its feeling that the opening statement of the Government was prejudicial to the remaining defendants.

It is respectfully submitted that under the language of Downum, Jorn and Dinitz, the trial was aborted without the consent of Giangrande or Fago, and appellant is entitled to the benefits and protection of the Double Jeopardy Clause of the Fifth Amendment barring his re-prosecution.

POINT II

JEOPARDY ATTACHED AFTER THE SELECTION OF THE FIRST JURY. APPELLANT GIANGRANDE IS ENTITLED TO THE PROTECTION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARRING HIS RE-PROSECUTION.

There is little doubt that under the Double Jeopardy Clause of

the Fifth Amendment, jeopardy attaches when a criminal trial commences before a judge or jury. United States v. Jorn, supra; Green v. United States, supra; Wade v. Hunter, supra. Jeopardy attaches when a jury has been selected and sworn, even though no evidence has been taken. Downum v. United States, supra; Illinois v. Somerville, supra.

In this case, therefore, jeopardy clearly attached when the jury was selected and sworn, and the opening statement of the Government was delivered to the Court and jury.

The declaration of a mistrial by the Court in this case neither with the consent of the appellant nor on his motion, under the circumstances occurring at the trial, warrant the barring of his re-prosecution under the double jeopardy provisions of the Fifth Amendment.

The Double Jeopardy Clause of the Fifth Amendment protects the appellant from repeated prosecutions for the same offense. United States v. Wilson, 420 U.S. 332, 343, 95 S. Ct. 1013, 1021; North Carolina v. Pearce, 395 U. S. 711, 717, 89 S. Ct. 2072, 2076.

In the case of United States v. Dinitz, supra, Mr. Justice Stewart, writing the majority opinion therein, stated at 96 S. Ct. p. 1081-82:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by the judge or prosecutor' threatens the 'harassment of an accused by succesive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. United States v. Jorn, supra, 400 U.S. at 485, 91 S. Ct. at 557, 27 L. Ed. 2d at 556; Downum v. United States, 372 U.S. at 736, 83 S.Ct. at 1034, 10 L. Ed. 2d at 102. See Gori v. United States, supra, 367 U.S. at 369, 81 S.Ct. at 1526, 6 L. Ed. 2d 905; United States v. Jorn, supra, 400 U.S. at 489, 91 S.Ct. at 559, 27 L. Ed. at 558 (dissenting opinion); cf. Wade v. Hunter, supra,

336 U.S. at 692, 69 S. Ct. at 838, 93 L. Ed. at 979."

As has been stated in many of the cases previously cited, there is no rigid mechanical rule to determine whether a defendant is entitled on particular facts to the protection of the Double Jeopardy Clause of the Fifth Amendment.

The facts in this case, while not fitting exactly into any particular niche of the cited cases, do come closest to the Downum, Jorn and aspects of the Dinitz case, which warrant barring re-prosecution under the Double Jeopardy Clause of the Fifth Amendment.

The instant case is distinguishable from a case decided by this Court in 1975, United States v.Gentile, 525 F. 2d 252. One of the defendants therein moved for a mistrial and the Court found the other defendant to have participated in or acquiesced in the same motion. This court found in that case (at page 257) the mistrial declared "because of an inadvertant error of the prosecutor and benefit to the defendant as the sole motivation", and additionally stated in a footnote on the same page:

> "There may be circumstances when a double jeopardy defense should prevail even though the declaration of a mistrial was not an abuse of discretion, e.g., when a prosecutor, sensing that things are not going well, deliberately makes a highly inflammatory remark."

In the instant case, it is submitted, there was no unwitting or inadvertant action on the part of the Government; but a purposeful and intentional overreaching which seriously prejudiced the appellant. This type of prosecutorial overreaching and misconduct should not permit the re-prosecution of the appellant.

Appellant Giangrande did not retain "primary control over the course to be followed" as stated in the majority opinion of Dinitz at

96 S. Ct. 1081. The Trial Court declared a mistrial on its own, based on the aforestated prosecutorial overreaching and misconduct.

In point, a recent case decided in the United States Court of Appeals for the Fifth Circuit in 1975, United States v. Alford, 516 F. 2d 941, reversed a conviction and held that the defendant was subjected to double jeopardy when he was tried a second time after a mistrial had been declared in the first proceeding. In Alford, the defendant was served with a defective and mistaken indictment. A mistrial was declared during the course of the court proceedings on that indictment, and the Fifth Circuit Court of Appeals held that "manifest necessity" did not exist for the declaration of the mistrial.

The Fifth Circuit Court in Alford quoted from the plurality opinion in Jorn, and found that the defendants had not moved for a mistrial. They did find, however, that the judge initiated the suggestion of a mistrial and found prosecutorial misconduct. In Alford, the Court stated at p. 948-949:

> " . . .In other words, the Government asks us to hold that it can make an error and never suffer the consequences of it - the defendants who found themselves in this position are either forced into asking for a mistrial or forced into waiving the error and proceeding under whatever debilitation results from the prosecutorial error.
>
> The constitutional bar to double jeopardy is not avoided by this slight of hand. The record here indicates that no defendants consented to a mistrial. . . . . The twist that the government attempts to place on the facts does not make defense counsel movants or legally acquiescent. The sacred constitutional right to be free of double jeopardy is not to be evaded by prosecutorial contortionism. . . . . .
>
> There was no manifest necessity for the judge to declare a mistrial as to appellant Alford. Nor did Alford ask for or consent to the declaration of a mistrial when his lawyer refused to choose another option which had been offered to the prosecutor and which the prosecutor illegitimately attempted to pass on to all the defense counsel. We therefore believe that Alford was subjected to double jeopardy when he was tried a second time after a mistrial was declared in the first proceeding, and his conviction must be reversed."

The appellant Giangrande did not cause, nor was he responsible in any way, for the overreaching and misconduct of the Government in its opening statement. Likewise, he did not move, nor did he consent to the Court's sua sponte declaration of a mistrial.

The appellant should not be subjected to re-prosecution, and the attendant anxiety, expense and delay occasioned thereby.

The Trial Court's declaration of a mistrial, under the circumstances heretofore set forth, was an abuse of discretion. The prosecutorial overreaching and misconduct did not constitute the required "manifest necessity".

CONCLUSION

FOR ALL OF THE REASONS SET FORTH IN POINTS I AND II, THE ORDER OF THE EASTERN DISTRICT COURT DATED JUNE 23rd, 1976 DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT SHOULD BE REVERSED; THE SAID MOTION GRANTED; AND THE GOVERNMENT BARRED FROM RE-PROSECUTING THE APPELLANT.

Respectfully Submitted,

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